

LAW OFFICE OF RICCI & SPROULS

Attorneys at Law

445 Washington Street

San Francisco, California 94111

(415) 391 2100

FAX (415) 391 4678

FRANK P. SPROULS State Bar #166019 WIEKING

Attorney for Petitioner, CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORIGINAL
FILED

MAY 2 2008

E-filing

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

Jose Alberto Navarro
Petitioner,

V

MICHAEL MUKASEY , ATTORNEY
GENERAL OF THE UNITED STATES
AND

CHARLES De Moore,
Acting District Director,
United States Citizenship &
Immigration Services

Respondent.

CV 08

PETITION FOR WRIT OF

MANDAMUS

SI

2288

The Plaintiff hereby petitions this Court for extraordinary relief in the nature of a writ of mandamus, directed to Defendant, the Attorney General and his employees and agents in the USCIS.

This action seeks the relief of compelling the Respondents to allow the Petitioner back into the United States following an erroneous Order of Removal.

1 The Respondents freely conceded that that are going to
2 "parole" the Petitioner, however, we have yet to see any actions
3 by the Respondents based on their promise.

4 In support of this verified petition, Plaintiff alleges the
5 following:

6 **THE PARTIES**

7 1. Plaintiff, Jose Alberto Navarro (hereafter the
8 "petitioner"), is a citizen and national of Mexico.

9 2. Defendant, Michael Mukasey, is the Attorney General of
10 the United States and controls the United States Citizenship and
11 Immigration Services.
12

13
14 **THE FACTS**

15 This case presents a litany of genuine human tragedy,
16 innocent and excusable error and finally Agency inaction.
17

18 The Petitioner is currently in Removal Proceedings brought
19 by the Respondents. (Exhibit A)

20 The Petitioner is pursuing concurrent relief, he is seeking
21 a from of relief known as Cancellation of Removal {INA 240A (b)}
22 which requires ten years presence in the United States and the
23 alien must also demonstrate that he is a person of good moral
24 character and the alien must also demonstrate extreme and
25

1 exceptionally unusual hardship to one's Lawful Resident or
2 citizen, spouse, parent or child. (Exhibit B)

3 Additionally, he is seeking Adjustment of Status based on a
4 visa petition filed by his now deceased father. (Exhibit C)

5 Petitioner filed a Motion to continue the case based on the
6 fact that the visa petition was not yet current. (Exhibit D)

7 A subsequent Motion to withdraw that Motion was filed based
8 on the tragic death of the Petitioner's father. (Exhibit E)

9 The Court ruled on the second motion and the Court granted
10 the motion to withdraw the request for a continuance. (Exhibit
11 F)

12 Through miscommunication, the office thought the first
13 motion to continue was the motion that was granted and the
14 Petitioner was told that he need not appear at the hearing.

15 The Immigration Judge then conducted an *in absentia* order
16 of Removal. (Exhibit G)

17 Petitioner's counsel then filed a Motion to Rescind the *in*
18 *absentia* order. (Exhibit H)

19 It is at this stage, that a simple ministerial error by the
20 Immigration Court staff resulted in a catastrophic event for the
21 Petitioner.

22 The Motion was pending and the Government filed a non-
23 opposition. (Exhibit I)

1 It appears that the Court clerk did not input the Motion
2 into the Court data-base.

3 On or about 03/27/08, the Petitioner was arrested by the
4 agents of the Respondent because they believed that they had a
5 final Order of Deportation.

6 The officers apparently checked with the data base and
7 concluded that there was no impediment to his deportation.

8 The Petitioner is a native and citizen of Mexico and the
9 Respondents remove aliens to Mexico on a daily basis and he was
10 ordered removed the same day that he was apprehended.

11 Now the problem is that the Removal of alien while an in
12 *absentia* order is pending is contrary to law.

13 The filing of Motion to rescind an in *absentia* Order
14 automatically, as matter of law, stays removal until the IJ
15 rules on the motion. INA 240(b) (5) (C)

16 Now, the officers were arguably not at fault, however, the
17 result for the petitioner is the same in the sense that the
18 Petitioner was unlawfully removed from the United States.

19 Following the removal, agents of the Respondents, as well
20 as an attorney of the Office of District Counsel conceded that
21 the Petitioner should not have been removed and that they would
22 take all reasonable steps to have him returned to the United
23 States.
24
25

1 Subsequent to the concession of the Respondents, the
2 Immigration Judge reopened the case and the Petitioner has a
3 Court date set for June 27, 08. (Exhibit J)

4 The Detention officer in charge is Officer James Bible and
5 he has been unfailingly polite and professional and he has
6 informed us over the past three weeks that all the proper
7 paperwork has been filed and the Petitioner's return is being
8 processed by "Headquarters" in Washington D.C.

9
10 Now, in the age of faxes, e-mails and the like, there is no
11 reason for this unreasonable delay.

12 The Petitioner entered the United States when he nine years
13 of age.

14 He is utterly adrift in Mexico.

15 His family is of modest means and they are groaning under
16 the weight of having to fund the Petitioner's exile in Mexico.

17
18
19 **ARGUMENT**

20 **A. Governing Law**

21 The relief of mandamus is only available if the petitioner
22 demonstrates "(1) a clear right to the relief, (2) a clear duty
23 by the defendant to do the act requested, and (3) the lack of
24 any other adequate remedy." Allied Chemical Corp. et. al v.
25 Daiflon, 449 U.S. 33 (1980)

1 This case abundantly meets the test for mandamus relief.

2
3
4
5 **I. Clear Right to the Relief**
6

7 The Government concedes that the Petitioner should be
8 returned to the United States to continue his Immigration Case.
9

10 There is obviously no other legal venue for the Petitioner
11 to return to the United States and thus he has a clear right to
12 the relief.
13

14
15 **II. CLEAR DUTY TO ACT**

16 It is again acknowledged by the Government that the removal
17 was erroneous and he has an absolute right to return to the
18 United States.
19

20
21 **III. Lack of Any Other Adequate Remedy**
22

23 This is piercingly obvious. The only legal avenue to enter
24 the United States is with an immigrant visa, a non-immigrant
25 visa or some form of official "parole" that will allow the
Customs officials to admit the alien.

1 At the present time, it is painfully clear that the
2 applicant/petitioner has no other relief at law.,

3 Now, obviously this is the type of situation that could be
4 worked out informally, however Petitioner has made numerous
5 attempts to have the Respondents simply do what they have
6 promised that they would do. (Exhibit K)

7 The Petitioner and his family are obviously frustrated and
8 they must turn to this court for equitable intervention.
9

10
11
12
13 Nature of Relief Sought

14 This action asks the Court to issue a writ of mandamus
15 compelling the Respondents to allow the Petitioner to re-enter
16 the United States.
17

18 Dated: 5-1 2008

19
20
21 
22 Frank P. Sprouls
23
24
25

EXHIBIT

A

U. S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

Act
LV

In removal proceedings under section 240 of the Immigration and Nationality Act:

File No: A98 132 337

In the Matter of:

Respondent: NAVARRO GONZALEZ, JOSE ALBERTO

currently residing at:

949 PARADISE BLVD HAYWARD, CA 94541-0000

000-000-0000

(Number, street, city, state and ZIP code)

(Area code and phone number)

- ☐ 1. You are an arriving alien.
- ☒ 2. You are an alien present in the United States who has not been admitted or paroled.
- ☐ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

- 1) You are not a citizen or national of the United States.
- 2) You are a native of MEXICO and a citizen of MEXICO;
- 3) You entered the United States at or near SAN YSIDRO, CA on or about January 1, 1984;
- 4) You were not then admitted or paroled after inspection by an Immigration Officer.

9 USC, Fall USC, malh JUN 3 2004

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

Section 212 (a) (6) (A)(i) of the Immigration and Nationality Act (Act), as amended, as an alien present in the United States without being admitted or paroled, or who has arrived in the United States at any time or place other than designated by the Attorney General.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:

550 KEARNY STREET, SUITE #800, SAN FRANCISCO, CA 94108-0000

(Complete Address of Immigration Court, including Room Number, if any)

on JUN 25 2004 at 8:30AM to show why you should not be removed from the United States based on
(Date) (Time)
the charge(s) set forth above.

[Signature]
(Signature and Title of Issuing Officer)

, Supervisory Asylum Officer

Date: 28 MAY 2004

SAN FRANCISCO, CA
(City and State)

See reverse for important information

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice, to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

(Signature of Respondent)

Before:

Date:

(Signature and Title of INS Officer)

Certificate of Service

This Notice To Appear was served on the respondent by me on JUN 01 2004, in the following manner and in compliance with section 239(a)(1)(F) of the Act:

(Date)



in person



by certified mail, return receipt requested



by regular mail



Attached is a credible fear worksheet.



Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the _____ language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

(Signature of Respondent if Personally Served)

(Signature and Title of Officer)

EXHIBIT

B

U.S. Department of Justice
Executive Office for Immigration ReviewPLEASE READ ADVICE AND INSTRUCTIONS
BEFORE FILLING IN FORM

PLEASE TYPE OR PRINT



PART 1 - INFORMATION ABOUT YOURSELF

| | | | |
|--|--|--|--|
| 1) My present true name is: (Last, First, Middle) NAVARRO - GONZALEZ Jose Alberto | | 2) Alien Registration Number: 98 132 337 | |
| 3) My name given at birth was: (Last, First, Middle) NAVARRO - GONZALEZ, Jose Alberto | | 4) Birth Place: (City, Country) Tijuana Mexico | |
| 5) Date of Birth: (Month, Day, Year) 2/3/1975 | 6) Gender: <input checked="" type="checkbox"/> Male <input type="checkbox"/> Female | 7) Height: 5.05 | 8) Hair Color: Black |
| | | 9) Eye Color: Brown | |
| 10) Current Nationality & Citizenship: Mexico | 11) Social Security Number: 613-82-5292 | 12) Home Phone Number: (510) 510-888-0418 | 13) Work Phone Number: (510) 351-7551 |
| 14) I currently reside at: 23952 Myrtle St. Apt. number and/or in care of 949 Paradise Blvd Number and Street Hayward City or Town CA State 94541 ZIP Code | | 15) I have been known by these additional name(s): None Jose Navarro | |

16) I have resided in the following locations in the United States: (List PRESENT ADDRESS FIRST, and work back in time for at least 10 years.)

| Street and Number - Apt. or Room# - City or Town - State - ZIP Code | Resided From: (Month, Day, Year) | Resided To: (Month, Day, Year) |
|---|-------------------------------------|-----------------------------------|
| 949 Paradise Blvd Hayward CA 94541 | 05/2001 | PRESENT 5/2005 |
| 2777 La Port Avenue, Hayward, CA 94545 | 1985 | 05/2001 |
| | | |
| | | |

PART 2 - INFORMATION ABOUT THIS APPLICATION

17) I, the undersigned, hereby request that my removal be cancelled under the provisions of section 240A(b) of the Immigration and Nationality Act (INA). I believe that I am eligible for cancellation of removal because: (check all that apply)

- ☒ My removal would result in exceptional and extremely unusual hardship to my: (Place a USC in the space if the family member is a citizen of the United States, an L if the family member is a lawful permanent resident of the United States, and an X if the family member is neither, and leave BLANK if not applicable.)

_____ Husband _____ Wife USC Father LPR Mother USC Child or Children.

With the exception of absences described in question #25, I have resided in the United States since:
(Month, Day, Year) 1984

- ☐ I, or my child, have been battered or subjected to extreme cruelty by a United States citizen or lawful permanent resident spouse or parent.

With the exception of absences described in question #25, I have resided in the United States since:
(Month, Day, Year)

Please use a separate sheet for additional entries.
(1)

Form EOIR-42B
August 2002

EXHIBIT

C

| | | |
|---|-----------------------------------|---|
| RECEIPT NUMBER WAC-95-042-51150 | | PLACEMENT OF ORPHAN |
| RECEIPT DATE December 2, 1994 | PRIORITY DATE December 1, 1994 | PETITIONER A91 757 027 NAVARRO, RAFAEL |
| NOTICE DATE January 23, 1995 | PAGE 1 of 1 | BENEFICIARY NAVARRO, JOSE A. |
| LYNETTE PARKER INTNL INSTITUTE OF THE EAST BAY 297 LEE ST OAKLAND CA 94610 | | Notice Type: Approval Notice Section: Unmarried child under 21 of permanent resident, 203(a)(2)(A) INA |

The above petition has been approved. We have sent the original visa petition to the Department of State National Visa Center (NVC), 32 Rochester Avenue, Portsmouth, NH 03801-2909. NVC processes all approved immigrant visa petitions that need consular action. It also determines which consular post is the appropriate consulate to complete visa processing. NVC will then forward the approved petition to that consulate.

This completes all INS action on this petition. If you have any questions about visa issuance, please contact the NVC directly. The telephone number to NVC is (603) 334-0700.

The NVC will contact the person for whom you are petitioning concerning further immigrant visa processing steps.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE
WESTERN SERVICE CENTER
P. O. BOX 30111
LAGUNA NIGUEL CA 92607-0111
Customer Service Telephone: (714) 643-4880





No. 22139084

OFFICE OF THE COMMISSIONER

DEPARTMENT OF JUSTICE

Personal description of holder
as of date of naturalization:

Date of birth: DECEMBER 03, 1950

Sex: MALE

Height: 5 feet 08 inches

Marital status: MARRIED

Country of former nationality:
MEXICO



INS Registration No. A91 757 027

I certify that the description given is true, and that the photograph affixed
hereto is a likeness of me.

Rafael Navarro
(Complete and true signature of holder)

Be it known that, pursuant to an application filed with the Attorney General

at: SAN FRANCISCO, CA

The Attorney General having found that:

RAFAEL NAVARRO

then residing in the United States, intends to reside in the United States when so
required by the Naturalization Laws of the United States, and had in all other
respects complied with the applicable provisions of such naturalization laws and was
entitled to be admitted to citizenship, such person having taken the oath of allegiance
in a ceremony conducted by the

U.S. DISTRICT COURT
FOR THE NORTHERN CALIFORNIA

at: SAN FRANCISCO, CA

on: JAN 2, 1951

that such person is admitted as a citizen of the United States of America.

Chris Preciado

Commissioner of Immigration and Naturalization

IT IS PUNISHABLE BY U. S. LAW TO COPY,
PRINT OR PHOTOGRAPH THIS CERTIFICATE,
WITHOUT LAWFUL AUTHORITY.

EXHIBIT

D

LAW OFFICE OF RICCI AND SPROULS
445 WASHINGTON STREET
SAN FRANCISCO, CA 94111
TEL: (415) 391-2100
FAX: (415) 391-4678

2007 DEC 21 PM 12:04

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

In the Matter of)

JOSE ALBERTO NAVARRO-GONZALEZ)

Respondent in Removal Proceedings)

A# 98 132 337

Hearing: 1/15/2008

Time: 8:30 AM

Judge: Hon. DiCostanzo

MOTION TO CONTINUE MATTER OF VELARDE

Respondent is scheduled to appear before the court on a merits hearing of his adjustment of status application.

Respondent's father, Rafael Navarro, is a United States Citizen (EXHIBIT A) and the Respondent is the beneficiary of a Petition for Alien Relative, Form I-130 with a priority date of December 1, 1994. (EXHIBIT B)

Respondent is an unmarried son of a United States Citizen and thereby falls within the 1st category of the family Visa Bulletin. According to the bulletin the visa center is currently processing July 1, 1992. (EXHIBIT C)

Although the Respondent is also eligible to proceed under INA 240A(b), cancellation of removal for certain nonpermanent residents, Respondent's Adjustment application is would considerably promote judicial economy.

Under the Matter of Velarde, Int. Dec. 3463 (BIA 2002), which holds that the BIA no longer requires an approved I-130 to reopen and remand proceedings, a continuance would be appropriate in this matter.

Counsel, thereby, respectfully seeks a continuance in this matter to monitor the priority date of Respondent's application I-130. We suggest that this matter be placed on the master calendar to

monitor the priority dates that are being processed.

Respectfully submitted:

Dated: 12-20 2007


Frank P. Sprouls

EXHIBIT

E

LAW OFFICE OF RICCI AND SPROULS
445 WASHINGTON STREET
SAN FRANCISCO, CA 94111
TEL: (415) 391-2100
FAX: (415) 391-4678

RECEIVED
DEPARTMENT OF JUSTICE
JAN 8 2008
FEDERAL BUREAU OF INVESTIGATION
SAN FRANCISCO OFFICE
IMMIGRATION AND NATURALIZATION SERVICE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

| | | |
|-----------------------------------|---|------------------------|
| In the Matter of |) | |
| |) | |
| JOSE ALBERTO NAVARRO-GONZALEZ |) | A# 98 132 337 |
| |) | Hearing: 1/15/2008 |
| |) | Time: 8:30 AM |
| Respondent in Removal Proceedings |) | Judge: Hon. DiCostanzo |

Motion to withdraw previously filed Motion to Continue due to death of petitioner

Respondent was the beneficiary of a petition filed by his USC father. A motion to continue was filed by our office on December 20, 2007 given the priority date was not yet current.

Sadly our office learned today that the Respondent's father passed away on November 29, 2007. The family has been grieving and dealing with the consequences of this incident and was unable to inform us at an earlier date.

Given that Respondent's I-130 petition is no longer valid; we seek to withdraw our motion. We will simply be pursuing Respondent's Cancellation of Removal application for the next hearing date.

Dated: 1-8 2008



Frank D. Sprouls

EXHIBIT

F

terv (ES)

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
120 MONTGOMERY ST., SUITE 800
SAN FRANCISCO, CA 94104

JAN 11 2008

LAW OFFICE OF RICCI & SPROULS
RICCI, JOHN E.
445 WASHINGTON STREET
SAN FRANCISCO, CA 94111

Date: Jan 9, 2008

File A98-132-337

In the Matter of:
NAVARRO GONZALEZ, JOSE ALBERTO

Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee (\$110.00).

Enclosed is a copy of the oral decision.

Enclosed is a transcript of the testimony of record.

You are granted until _____ to submit a brief to this office in support of your appeal.

Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

☒ Enclosed is a copy of the order decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

Elean Hiscox

Immigration Court Clerk

UL

cc: ASSISTANT CHIEF COUNSEL
120 MONTGOMERY STREET, STE 200
SAN FRANCISCO, CA 941040000

Executive Office for Immigration Review
Immigration Court
120 Montgomery Street, Suite 800
San Francisco, California 94104

for (ES)

In the Matter of:

File Number: A98-132-337

NAVARRO GONZALEZ, JOSE ALBERTO

Respondent(s)

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of (X) Respondent's/Counsel's () Government's motion to / request for:

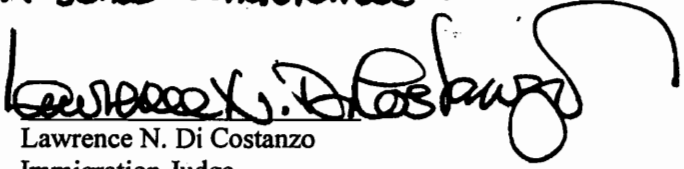
- () Continue hearing - Scheduled for Individual/Master Calendar
- () Advance hearing date - Scheduled for Individual/Master
- () Administrative Closure
- () Terminate Removal Proceedings
- () Withdraw as Attorney of Record filed by attorney:
- () Motion to Reopen/Reconsider
- () Telephonic appearance of: ☐ Attorney ☐ Witness(s)
- (X) Other: **Motion to withdraw previously filed Motion to Continue**

It is HEREBY ORDERED that the above motion be ☒ GRANTED ☐ DENIED because of the reason(s) set forth below:

- ☐ There being no opposition to the motion.
- ☐ Good cause has been established for the above request.
- ☐ Opposition to the motion has not been filed with this Court.
- ☐ In the Government's opposition.
- ☐ The motion is untimely per San Francisco Immigration Court Local Operating Procedure.
- ☒ Other: **Motion is noted + Court sends condolences to Respondent.**

Date:

1-9-08


Lawrence N. Di Costanzo
Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: ☒ MAIL ☐ PERSONAL SERVICE
TO: ☐ ALIEN ☐ ALIEN c/o Custodial Officer ☒ ALIEN's ATTY/REP ☐ INS=
DATE: 1-9-08 BY: COURT STAFF EL

EXHIBIT G

IMMIGRATION COURT

120 MONTGOMERY STREET, SUITE 800, COURTROOM 3
SAN FRANCISCO, CA 94108JAN 16 2008
ACTVES

In the Matter of:

Case No: A

98 132 337

IN REMOVAL PROCEEDINGS

705

1602

ORDER OF THE IMMIGRATION JUDGE

This a summary of the oral decision entered on JAN. 15, 2008.
 This memorandum is solely for the convenience of the parties. If the
 proceedings should be appealed or reopened, the oral decision will become
 the official opinion in the case.

- ☒ The respondent was ordered removed from the United States to Mexico
☐ Respondent's application for voluntary departure was denied and
 respondent was ordered removed to _____ or in the alternative
 to _____.
☐ Respondent's application for voluntary departure was granted
 until _____ upon posting a bond in the amount of \$ _____
 with an alternative order of removal to _____.
☐ Respondent's application for asylum was () granted () denied
 () withdrawn () other.
☐ Respondent's application for withholding of removal under section
 241(b)(3) of the INA to _____ was () granted () denied
 () withdrawn () other.
☐ Respondent's application for protection under Article III of the U.N.
 Convention Against Torture was () granted () denied () withdrawn
 () other.
☐ Respondent's application for cancellation of removal under section
 240A(a) was () granted () denied () withdrawn () other.
☐ Respondent's application for cancellation of removal under section
 240A(b) was () granted () denied () withdrawn () other. If
 granted, it was ordered that the respondent be issued all appropriate
 documents necessary to give effect to this order.
☐ Respondent's application for a waiver under former section 212(c) of the
 INA was () granted () denied () withdrawn () other.
☐ Respondent's application for adjustment of status under section _____
 of the INA was () granted () denied () withdrawn () other.
 If granted, it was ordered that respondent be issued all appropriate
 documents necessary to give effect to this order.
☐ Respondent knowingly filed a frivolous asylum application after
 proper notice.

☒ Other: all applications deemed abandoned;
"in absentia" proceedings.

Appeal Waived/Reserved: A I B

Appeal due by: _____

Date: 1-15-08

Lawrence N. Di Costanzo
 Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL ☒ PERSONAL SERVICE ☐
 TO: [] ALIEN [] ALIEN c/o Custodial Officer ☒ ALIEN'S ATTY/REP ☐ DHS
 DATE: 1-15-08 BY: (IJ) COURT STAFF LATE/ETH
 Attachments: [] EOIR-33 [] EOIR-28 [] Legal Services List []

EXHIBIT H

LAW OFFICE OF RICCI & SPROULS
Attorneys at Law
445 Washington Street
San Francisco, CA 94111
Frank P. Sprouls
(415) 391 2100
Attorneys for Respondent

RECEIVED
DEPARTMENT OF JUSTICE
2008 JAN 17 PM 3:27
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

IMMIGRATION AND NATURALIZATION SERVICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
SAN FRANCISCO, CALIFORNIA

In the matter of
JOSE ALBERTO NAVARRO-GONZALEZ
Respondent

File No. A [REDACTED]

98 132 337

MOTION TO REOPEN/RESCIND IN ABSENTIA ORDER OF
DEPORTATION/MATTER OF LOZADA

Mea culpa, mea culpa mea maxima culpa. The double tragedy in this case has been brought about solely and exclusively through the fault of present counsel and the Respondent is completely and utterly blameless.

I received the 01/09/08 decision of the Immigration Judge granting the motion along with a sensitive note of condolence.

I fully understand that we filed a Motion to withdraw the previously filed Motion to Continue, however I will sheepishly aver that I do sign some pro forma legal motions

that were drafted by others and the withdrawal of the motion to Continue was not in the forefront of my consciousness and I though we still had the Motion to continue pending.

I was fully aware that the Respondent had just lost his father and I simply did not read the Order carefully.

I saw "granted" and "condolences" and out of solicitude for the grief of the Respondent I immediately had my receptionist call the Respondent and tell him that the Motion to continue was granted and he did not have to appear on the 15th.

The Respondent had no earthly reason to fail to appear and much more importantly, the Law office of Ricci and Sprouts certainly has no reason to consciously flout a Court Hearing Notice.

The fault is solely mine.

I am sure the Court and Government counsel would concede that the Law office of Ricci and Sprouls does not have a pattern and practice of failing to appear for regularly scheduled hearings and thus there is a genuine *res ipsa* quality to this case.

Next, the Respondent has been in proceeding for many years and he has always appeared and he truly has no earthly reason to fail to attend a duly Noticed hearing.

I. MOTION TO RESCIND IN ABSENTIA ORDERS.

INA 240 (b) (5) allows for in absentia orders of removal provided proper notice has been received.

An in absentia order may be rescinded under the following

Circumstances;

(C) RESCISSION OF ORDER - SUCH AN ORDER MAY BE RESCINDED ONLY-

(i) Upon a motion to reopen filed within 180 days of after the date of the order of removal if the alien demonstrates that the failure to appear was based on exceptional circumstances (as defined in subsection (e) (1) or

(ii) Upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice..." section 239..."

In the instant case the exceptional circumstances are the sloppy and negligent actions of present counsel.

A. MOTION TO REOPEN REQUIREMENTS UNDER LOZADA

Matter of Lozada 19 I&N Dec. 637 (BIA 1988) sets forth the criteria which must be met in order to bring a motion to reopen based on ineffective assistance of counsel.

Prior counsel must be informed that allegations of ineffective assistance have been filed and be given the opportunity to respond.

It is established law under the Ninth Circuit that the

rules of Lozada are not mechanical and unyielding and where the ineffective assistance of counsel is clear and manifest, there is no need to follow the predicates of Lozada. Ontiveros-Lopez v. INS, 213 F.3d. 1121 (9th Cir. 2000).

That is surely the case is here. The father's body is not yet cold and counsel misreads an IJ's order and he now presents the grieving son with an Order of Removal.

CONCLUSION

Based on the foregoing, the *in absentia* order of Removal should be rescinded and proceedings should be reopened.

Dated; 1-17 2008


Frank P. Sprouls

US DHS
SAN FRANCISCO
RETAIN THIS RECEIPT

2:45PM Jan 17/08
00-0000 001 SFR-PC
#27023

A # 73959677
Last Name
NAVARRO-GONZALEZ
First Name
JOSE ALBERTO

MTR-Reopen \$110.00

Check \$110.00

Official
Document

Style Definition: Normal: Font: 10

pt

Formatted: Bottom: 1"

PROOF OF SERVICE -

Case name: 2 X V X R R C

A 73-959-677

I, the undersigned do hereby declare and affirm as follows;

I am employed at the law Office of Ricci Sprouls PC
AT 445 WASHINGTON STREET, SAN FRANCISCO, CA and I am not a
party to this action.

That on 1-17-08

I caused to be served on the following interested parties -

MOTION TO RECALL

BY FEDERAL EXPRESS MAIL

BY PERSONAL DELIVERY

BY REGULAR MAIL

OFFICE OF THE DISTRICT COUNSEL
IMMIGRATION AND NATURALIZATION SERVICE

District Counsel

120 Montgomery Street - 2nd Floor

San Francisco, CA

Dated: 1-17-08

William Sprouls

EXHIBIT

I

ACCVES

RONALD E. LE FEVRE
 Chief Counsel
 PAUL K. NISHIIE
 Deputy Chief Counsel
 DONALD THOMPSON
 Assistant Chief Counsel
 U.S. Department of Homeland Security
 U.S. Immigration and Customs Enforcement
 Office of the Chief Counsel
 120 Montgomery Street, Suite 200
 San Francisco, California
 Phone: (415) 705-4010

by JAN '22 2008

UNITED STATES DEPARTMENT OF JUSTICE
 EXECUTIVE OFFICE OF IMMIGRATION REVIEW
 BEFORE THE IMMIGRATION COURTS

In the Matter of

NAVARRO-GONZALEZ, Jose Alberto
 Respondent,

In Removal Proceedings

File No.: A98 132 337
 San Francisco

**GOVERNMENT'S OPPOSITION TO
 RESPONDENT'S MOTION TO REOPEN**

IJ: Honorable Lawrence N. DiCostanzo

The Department of Homeland Security, Immigration and Customs Enforcement opposes respondent's motion to reopen, dated January 17, 2008. On January 15, 2008, the Immigration Judge ("IJ") conducted an *in absentia* hearing pursuant to section 240(b)(5)(A) of the Immigration and Nationality Act and ordered the respondent removed *in absentia*. See Attachment 1, Immigration Judge's Removal Order, January 15, 2008. The IJ found removability established as charged and deemed any pending applications abandoned. *Id.*

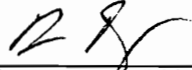
Respondent now files a motion to reopen the removal proceedings and rescind the *in absentia* order of removal. There is an obvious conflict of interest when present

counsel is asserting an ineffective assistance of counsel against himself. Although respondent's counsel asserts an ineffective assistance of counsel claim, there is no declaration from the allegedly aggrieved respondent as required by *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). Additionally respondent's counsel failed to notify the court whether any complaint has been filed with the appropriate disciplinary authorities. *Id.* at 639.

Accordingly, respondent's motion to reopen should be denied.

Dated: January 18, 2008

Respectfully submitted,



DONALD THOMPSON
Assistant Chief Counsel
San Francisco, CA

IMMIGRATION COURT
 120 MONTGOMERY STREET, SUITE 800, COURTROOM 3
 SAN FRANCISCO, CA 94108

In the Matter of:

Case No: A

98 132 337

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This a summary of the oral decision entered on Jan. 15, 2008.
 This memorandum is solely for the convenience of the parties. If the
 proceedings should be appealed or reopened, the oral decision will become
 the official opinion in the case.

- ☒ The respondent was ordered removed from the United States to Mexico
- ☐ Respondent's application for voluntary departure was denied and
 respondent was ordered removed to _____ or in the alternative
 to _____.
- ☐ Respondent's application for voluntary departure was granted
 until _____ upon posting a bond in the amount of \$ _____
 with an alternative order of removal to _____.
- ☐ Respondent's application for asylum was () granted () denied
 () withdrawn () other.
- ☐ Respondent's application for withholding of removal under section
 241(b)(3) of the INA to _____ was () granted () denied
 () withdrawn () other.
- ☐ Respondent's application for protection under Article III of the U.N.
 Convention Against Torture was () granted () denied () withdrawn
 () other.
- ☐ Respondent's application for cancellation of removal under section
 240A(a) was () granted () denied () withdrawn () other.
- ☐ Respondent's application for cancellation of removal under section
 240A(b) was () granted () denied () withdrawn () other. If
 granted, it was ordered that the respondent be issued all appropriate
 documents necessary to give effect to this order.
- ☐ Respondent's application for a waiver under former section 212(c) of the
 INA was () granted () denied () withdrawn () other.
- ☐ Respondent's application for adjustment of status under section _____
 of the INA was () granted () denied () withdrawn () other. If
 granted, it was ordered that respondent be issued all appropriate
 documents necessary to give effect to this order.
- ☐ Respondent knowingly filed a frivolous asylum application after
 proper notice.

☒ Other: all applications deemed abandoned;
"in absentia" proceedings.

Appeal Waived/Reserved: A I B

Appeal due by: _____

Date: 1-15-08

Lawrence N. Di Costanzo
 Immigration Judge

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL ☒ PERSONAL SERVICE ☒
 TO: [] ALIEN [] ALIEN c/o Custodial Officer ☒ ALIEN'S ATTY/REP [] DHS
 DATE: 1-15-08 BY: IJ COURT STAFF LAURENCE N. DI COSTANZO
 Attachments: [] EOIR-33 [] EOIR-28 [] Legal Services List []

CERTIFICATE OF SERVICE

I, the undersigned, declare:

That I am a citizen of the United States over the age of 18 years and not a party to the within-entitled action. I am an employee of the U.S. Dept. of Homeland Security and my business address is 120 Montgomery Street, Suite 200, San Francisco, California 94104;

That I served a true copy of the attached **GOVERNMENT'S OPPOSITION** by U.S. Mail, full postage paid, addressed as follows:

Frank P. Sprouls
Law Office of Ricci & Sprouls
Attorneys at Law
445 Washington Street
San Francisco, CA 94111

Executed on January 18, 2008, at San Francisco, California.



Donald Thompson
Assistant Chief Counsel

EXHIBIT

J

ACTV
LV63

ly APR - 8 2008

NOTICE OF HEARING IN REMOVAL PROCEEDINGS
IMMIGRATION COURT120 MONTGOMERY ST., SUITE 800
SAN FRANCISCO, CA 94104RE: NAVARRO GONZALEZ, JOSE ALBERTO
FILE: A98-132-337

DATE: Apr 4, 2008

TO: LAW OFFICE OF RICCI & SPROULS
RICCI, JOHN E.
445 WASHINGTON STREET
SAN FRANCISCO, CA 94111Please take notice that the above captioned case has been scheduled for a
MASTER hearing before the Immigration Court on Jun 27, 2008 at 09:00 A.M. at:120 MONTGOMERY ST., SUITE 800, COURTROOM 3
SAN FRANCISCO, CA 94104

You may be represented in these proceedings, at no expense to the Government, by an attorney or other individual who is authorized and qualified to represent persons before an Immigration Court. Your hearing date has not been scheduled earlier than 10 days from the date of service of the Notice to Appear in order to permit you the opportunity to obtain an attorney or representative. If you wish to be represented, your attorney or representative must appear with you at the hearing prepared to proceed. You can request an earlier hearing in writing.

Failure to appear at your hearing except for exceptional circumstances may result in one or more of the following actions: (1) You may be taken into custody by the Department of Homeland Security and held for further action. OR (2) Your hearing may be held in your absence under section 240(b)(5) of the Immigration and Nationality Act. An order of removal will be entered against you if the Department of Homeland Security established by clear, unequivocal and convincing evidence that a) you or your attorney has been provided this notice and b) you are removable.

IF YOUR ADDRESS IS NOT LISTED ON THE NOTICE TO APPEAR, OR IF IT IS NOT CORRECT, WITHIN FIVE DAYS OF THIS NOTICE YOU MUST PROVIDE TO THE IMMIGRATION COURT SAN FRANCISCO, CA THE ATTACHED FORM EOIR-33 WITH YOUR ADDRESS AND/OR TELEPHONE NUMBER AT WHICH YOU CAN BE CONTACTED REGARDING THESE PROCEEDINGS. EVERYTIME YOU CHANGE YOUR ADDRESS AND/OR TELEPHONE NUMBER, YOU MUST INFORM THE COURT OF YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER WITHIN 5 DAYS OF THE CHANGE ON THE ATTACHED FORM EOIR-33. ADDITIONAL FORMS EOIR-33 CAN BE OBTAINED FROM THE COURT WHERE YOU ARE SCHEDULED TO APPEAR. IN THE EVENT YOU ARE UNABLE TO OBTAIN A FORM EOIR-33, YOU MAY PROVIDE THE COURT IN WRITING WITH YOUR NEW ADDRESS AND/OR TELEPHONE NUMBER BUT YOU MUST CLEARLY MARK THE ENVELOPE "CHANGE OF ADDRESS." CORRESPONDENCE FROM THE COURT, INCLUDING HEARING NOTICES, WILL BE SENT TO THE MOST RECENT ADDRESS YOU HAVE PROVIDED, AND WILL BE CONSIDERED SUFFICIENT NOTICE TO YOU AND THESE PROCEEDINGS CAN GO FORWARD IN YOUR ABSENCE.

A list of free legal service providers has been given to you. For information regarding the status of your case, call toll free 1-800-898-7180 or 703-305-1662.

CERTIFICATE OF SERVICE

THIS DOCUMENT WAS SERVED BY: MAIL ☒ PERSONAL SERVICE (P)
TO: [] ALIEN [] ALIEN c/o Custodial Officer [M] ALIEN's ATT/REP [M] DHS
DATE: 4-4-08 BY: COURT STAFF EL V3
Attachments: [] EOIR-33 [] EOIR-28 [] Legal Services List [] Other

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
120 MONTGOMERY ST., SUITE 800
SAN FRANCISCO, CA 94104

LAW OFFICE OF RICCI & SPROULS
RICCI, JOHN E.
445 WASHINGTON STREET
SAN FRANCISCO, CA 94111

Date: Apr 4, 2008

File A98-132-337

In the Matter of:
NAVARRO GONZALEZ, JOSE ALBERTO

Attached is a copy of the written decision of the Immigration Judge. This decision is final unless an appeal is taken to the Board of Immigration Appeals. The enclosed copies of FORM EOIR 26, Notice of Appeal, and FORM EOIR 27, Notice of Entry as Attorney or Representative, properly executed, must be filed with the Board of Immigration Appeals on or before _____. The appeal must be accompanied by proof of paid fee (\$110.00).

Enclosed is a copy of the oral decision.

Enclosed is a transcript of the testimony of record.

You are granted until _____ to submit a brief to this office in support of your appeal.

Opposing counsel is granted until _____ to submit a brief in opposition to the appeal.

☒ Enclosed is a copy of the order decision of the Immigration Judge *and Notice of Hearing in Removal Proceedings*. All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

Elsa Hiscop

Immigration Court Clerk

UL

cc: THOMPSON, DONALD W.
120 Montgomery Street, Ste 200
San Francisco, CA 94104

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
120 Montgomery Street, Suite 800
San Francisco, CA 94104

In the Matter of:

Jose Alberto NAVARRO GONZALEZ

Case Number: A 98 132 337
(Removal Proceedings)

* * * *

ORDER

In the circumstances here, I am willing to accept counsel's statement that he was not diligent and that the respondent is not at fault. The confession indicates ineffective assistance. Accordingly, I will grant the motion to reopen.

On another note, I am concerned that counsel did not read my order carefully and seems to have been unaware that he signed the motion to withdraw a continuance motion. I am also concerned about the statement that he sometimes signs other documents without reading them. He describes the documents as pro forma. Nonetheless, they are filed with the Court, and they have consequences.

Actually, I think that counsel had better remember that there is no such thing as a pro forma document — especially since the present motion has made an impression on me.

ORDER: The motion to reopen and to rescind the order of removal that issued in absentia on January 15, 2008, is granted.

Dated: 4.4.08

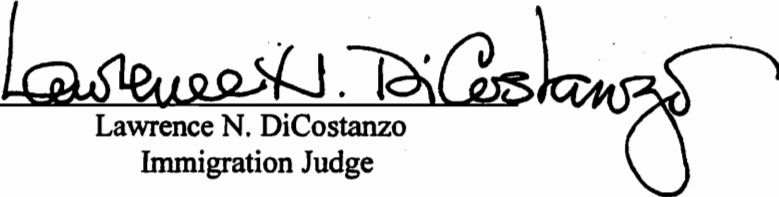

Lawrence N. DiCostanzo
Immigration Judge

EXHIBIT K

LAW OFFICE OF RICCI & SPROULS
445 WASHINGTON STREET
SAN FRANCISCO, CA 94111
415 391 2100
FAX 415 391 4678

03/27/08

DHS
OFFICE OF DETENTION AND DEPORTION
OFFICER BIBLE

RE; Jose Alberto Navarro-Gonzalez
A98 132 337

The above named alien has been in Removal proceedings for years.

There is an *in absenbtia* order based on a strange set of facts and a Motion to Rescind is pending. (See attached)

We had a motion to continue pending before the IJ based on the pending I-130 filed by his father.

The father died and we filed a Notice to Withdraw the Motion to Continue.

The IJ granted the Motion to Withdraw and we misread it as a Grant of the Motion to Continue and we instructed the alien to not attend the hearing.

The Motion stays Removal and I was wondering if we could make some arrangements for some type of Bond or supervised release.

Please feel free to call me at the above number.

Sincerely,



Frank P. Sprouls

LAW OFFICE OF RICCI & SPROULS
445 WASHINGTON STREET
SAN FRANCISCO, CA 94111
415 391 2100
FAX 415 391 4678

F16

03/28/08

DHS
OFFICE OF DETENTION AND DEPORTATION
OFFICER BIBLE

RE; Jose Alberto Navarro-Gonzalez
A98 132 337

This alien is the subject of a pending in absnetia order
which of course automatically stays removal.

I dropped off a letter and a copy of the Motion yesterday.

I understand you were out in the field and probably did not
receive it.

In any event, Mr. Navarro was erroneously deported last
night.

There is no question that I could file a writ in federal
court compelling his return, however I am sure that we can
work something out.

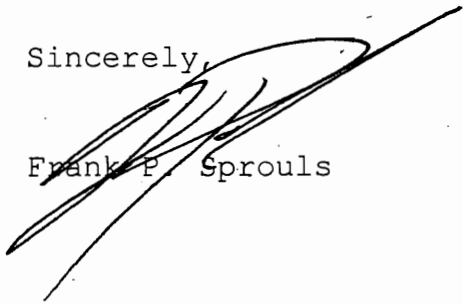
We certainly understand that mistakes happen and we do not
ascribe blame, however, Mr. ~~Piaz~~ was erroneously deported.

NAVARRO

Please feel free to call me at the above number.

Sincerely,

Frank P. Sprouls



LAW OFFICE OF RICCI AND SPROULS
445 WASHINGTON STREET
SAN FRANCISCO, CA
415 391 2100
FAX 415 391 4678

04/09/08

OFFICER BIBLE

Re; Jose Navarro
A98 132 337

Please find enclosed the Judge's order reopening the case of Jose Navarro.

He has a non-Custody Master scheduled for Jun. 27. 08.

I trust that he can be returned as soon as possible.

It would not be difficult to obtain an Order from a Federal Judge compelling his return, however I am sure that will not be necessary.

Sincerely,


Frank P. Sprouls

LA. OFFICE OF RICCI AND SPRUOLS
445 WASHINGTON STREET
SAN FRANCISCO, CA
415 391 2100
FAX 415 391 4678

04/14/08

To: Nancy Alcantar
Re: Jose Navarro

I understand that the hold-up in paroling this alien is that you were on assignment in El Paso.

I understand that you have your procedures; however the alien was unlawfully deported.

(It was clearly the IJ's clerk that made the error and your office is not at fault, however that does not alter the fact that the alien was removed with a pending Motion to Rescind and that is contrary to law)

Next, the Immigration Judge has reopened the case.

It is inconceivable that in the Modern Age of faxes, e-mails and overnight mail, that something cannot be accomplished with an administrator in another state.

There is no real impediment to my filing a writ of habeas corpus and asking for EAJA fees; however this is something that we can easily work out.

Please feel free to call me at the above number.

Sincerely,


Frank P. Sprouls

PROOF OF SERVICE -

Case name -

I, William Sprouls, the undersigned do hereby declare and affirm as follows;

I am employed at the law Office of Ricci and Sprouls at 445 Washington Street, San Francisco, CA and I am not a party to this action.

That on 5/2 /08

WRIT OF MANDAMUS

----x-----Regular mail

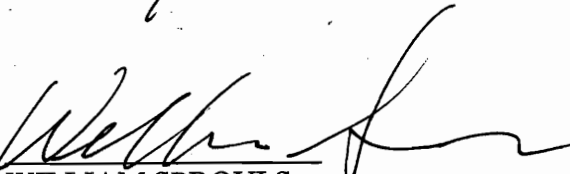
____E- File

--- X--- Personal Delivery To:

 x US ATTORNEYS OFFICE
CIVIL DIVISION
450 Golden Gate Ave.
San Francisco, CA

DISTRICT DIRECTOR INS
CITIZENSHIP UNIT
630 SANSOME STREET
SAN FRANCISCO, CA 94111

Dated 5/2 2008


WILLIAM SPROULS